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IN THE
Supreme Court of the United States

EARL OLD PERSON, CAROL JUNEAU, JOE MACDONALD, AND JEANNINE PADILLA,

Petitioners,

vs.

BOB BROWN, SECRETARY OF STATE FOR THE STATE OF MONTANA; AND JUDY MARTZ, GOVERNOR FOR THE STATE OF MONTANA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. This Case Has Become Moot; the Judgment Below Should Be Vacated and the Case Remanded with Directions to Dismiss

Defendants admit that this case has become "moot" and that "no justiciable controversy exists." Brief in Opposition at 12.[1] The only dispute between the parties is whether the Court should reverse or vacate the judgment below and remand with a direction to dismiss pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) .

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1. The final judgment of the court of appeals was issued on April 23, 2003, App. 148a, while the case did not become moot by virtue of the filing of a new redistricting plan by the independent Districting and Apportionment Commission until July 2, 2003. *See* Brief in Opposition at 17.

A. Defendants Seriously Misrepresent the Decisions of this Court Treating Mootness and Vacatur

Defendants erroneously claim that the decision in *Munsingwear* "rejected" the "policy" that moot civil cases should be vacated and remanded by the Court with directions to dismiss. Brief in Opposition at 14. To the contrary, in *Munsingwear* the Court held:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

340 U.S. at 39. In *Munsingwear*, however, the United States, which was the petitioner, made no motion to vacate the adverse judgment of the district court on mootness grounds but instead acquiesced in dismissal of its action by the court of appeals. Under the circumstances, the Court held that the United States had waived or "slept on its rights," and could not raise the issue of dismissal for the first time in the Supreme Court. *Id.* at 40 (the United States "did not avail itself of the remedy it had to preserve its rights"). But as the Court stressed, dismissal on mootness grounds "is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41.

In addition, the "established practice" described in *Munsingwear*, 340 U.S. at 39, was not merely "dictum" as defendants contend. Brief in Opposition at 15. It was described by the Court as "the standard disposition in federal civil cases," citing some 33 Supreme Court decisions which had applied the mootness/dismissal principle. *Id.* at 39 n.2. Indeed, prior to *Munsingwear*, the Court held in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936), that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss" (emphasis supplied).

Defendants also misrepresent the holding in *Karcher v. May*, 484 U.S. 72 (1987). The Court in fact approved the mootness/dismissal principle articulated in *Munsingwear* and subsequent cases, *citing Burke v. Barnes*, 479 U.S. 361, 365 (1987) (vacating as moot and remanding with instructions to dismiss), and *United States Department of Treasury v. Galioto*, 477 U.S. 556, 560 (1986) (vacating the judgment of the district court), but concluded that appellants were "not parties to this case" and thus lacked standing to assert a mootness/dismissal argument. 484 U.S. at 83. Nothing in *Karcher* remotely suggests that vacatur is not appropriate here.

Defendants' reliance upon *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), is completely misplaced. There, the Court held that mootness by reason of a settlement among the parties did not justify vacatur of the judgment under review. As important, the Court described *Munsingwear* as "[t]he leading case on vacatur," and concluded that:

> vacatur must be decreed for those judgments whose review is, in the words of *Munsingwear*, "'prevented through happenstance'" - that is to say, where a controversy presented for review has "become moot due to circumstances unattributable to any of the parties."

Id. at 22-3 (*quoting Karcher v. May*, 484 U.S. at 82). The Court also expressly affirmed the "equitable tradition of vacatur," *i.e.*, that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25. That is precisely the situation here. Plaintiffs challenge to Montana's 1990 legislative redistricting plan was frustrated, not by a settlement between the parties, but by the vagaries of circumstances - the adoption of a new plan by the state's independent redistricting commission based on the intervening 2000 census. *U.S. Bancorp Mortgage Co.* supports, and indeed requires, vacatur in this case.

B. Defendants' Discussion of the Public Interest Is Erroneous

Defendants misrepresent the discussion in *U.S. Bancorp Mortgage Co.* concerning the role of the "public interest" in granting or denying vacatur. What the Court actually said was, "the public interest is best served by granting relief [*i.e.*, vacatur] when the demands of 'orderly procedures ' . . . cannot be honored ." 513 U.S. at 26-7. It is only when those procedures can be honored, but are "voluntarily abandoned" by a settlement agreement of the parties, that vacatur may be inappropriate. *Id.* at 28.[2] As noted above, the orderly procedure of review by this Court was not voluntarily abandoned by plaintiffs but is unavailable because of mootness. The public interest here, and as *U.S. Bancorp Mortgage Co.* provides, is best served by vacatur.

The defendants' argument that "the public interest in finality of the judgment [in this case] is strong," Brief in Opposition at 18, is exactly the reverse of what the Court held in *U.S. Bancorp Mortgage Co.*, upon which defendants primarily rely. There, the Court held that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment." 513 U.S. at 25. As is apparent, litigants and the public have no legitimate interest in rulings that are "only preliminary," *Munsingwear*, 340 U.S. at 40, and that are denied review by "the vagaries of circumstances." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 25.

Dubrowsky v. Estate of Perlbinder, 268 B.R. 6, 2001 U.S. Dist. LEXIS 17067 (E.D.N.Y. 2001), relied upon by defendants in their Brief in Opposition at 18-9, aside from being a district court opinion and thus not binding upon this Court, does not support defendants' argument. There the

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2. While the Court denied vactur, it was careful to note that "[t]his is not to say vacatur can never be granted when mootness is produced in that fashion [as the result of a settlement agreement]. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course." 513 U.S. at 29.

district court, relying upon *U.S. Bancorp Mortgage Co.*, declined to vacate its prior decision pursuant to a subsequent settlement agreement among the parties. In this case, by contrast, there is no settlement agreement. The principle in *Dubrowsky* that settlement precludes vacatur has no application here.

C. Defendants' Arguments Are Contradictory and Misapprehend the Rationale for Vacatur

Defendants' arguments that "no justiciable controversy exists," Brief in Opposition at 12, but that it would be an "injustice . . . in taking that [defendants'] victory away," *id.* at 18, are contradictory and misapprehend the rationale of vacating decisions that have become moot on appeal. The arguments are contradictory because if there is no "controversy" there can be no "victory" or defeat.

Defendants' arguments misapprehend the rational for vacatur for the reasons explained by the Court in *Munsingwear*, 340 U.S. at 40, that "[w]hen that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." Vacatur as a matter of law does not deprive defendants of anything to which they are entitled nor prejudice them in any way.

Similarly, vacatur would neither "clear[ ]," Brief in Opposition at 18, nor besmirch the names of the members of the 1990 redistricting commission nor resolve the issue of whether they acted "with discriminatory intent." *Id.* Such determinations would be left where they were before the litigation, to the judgment of history based upon the contemporaneous record of the commission's deliberations.[3]

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3. The district court detailed some, but not all, of the obvious bias of members of the commission toward Indians and their proposed redistricting plans. *See, e.g.*, 131a (describing the tribe's demographer as a "jackass," an "S.O.B." and a "bugger"); 132a (suggesting that all the Indians in the state be packed in "one District"); 133a (complaining that placing whites in a majority Indian district would "emasculate a few more white voters"); 133a (continued...)

See Munsingwear, 340 U.S. at 40 (when vacatur is granted "the rights of all parties are preserved").

D. Plaintiffs Have no "Obligation" for Taxation of Defendants' Costs

Defendants make the factually and legally erroneous claim that plaintiffs have "an obligation for taxation of Defendants' cost for the first trial of $19,593, validly issued." Brief in Opposition at 18. To the contrary, costs have never been taxed in this case. The district court entered an order on November 30, 1998, postponing taxation of costs pending appeal and final determination whether defendants were entitled to costs. Accordingly, there is no judgment that plaintiffs are obligated for costs for the first trial in this case. Moreover, the application for costs submitted by defendants was grossly excessive and included items that were not allowable as costs and for which there was no or inadequate documentation. The application would be deniable on that basis alone.

Even if defendants had been awarded costs, which they were not, that award would be eliminated through vacatur. *See Munsingwear*, 340 U.S. at 40 (vacatur "eliminates a judgment, review of which was prevented through happenstance"). Defendants would have no entitlement to a judgment of costs "which in the statutory scheme was only preliminary." *Id.*

If defendants mean to suggest that they would be entitled to an award of costs to be made at some time in the future, then plaintiffs would have a right of review of any such award on appeal. *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991) (reviewing an award of costs and fees). But a case cannot be, as defendants concede, "moot" and present "no justiciable controversy," Brief in Opposition at 12, and still be actively litigated in federal

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3. (...continued)
(describing a tribal proposal to keep the Rocky Boy and Fort Belknap Reservations in one district as "idiotic" and "a bunch of crap").

court. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1977) (a controversy must be "extant" at all stages of review). The absence of a case or controversy would preclude a future award of costs to either party, just as vacatur would eliminate any judgment that might have been entered.

E. Defendants' Claim that this Court "Cannot" Grant Certiorari Is without Merit

Defendants contend that once this case became moot, plaintiffs "were not entitled to review by certiorari, and this Court cannot grant it." Brief in Opposition at 18. The claim ignores the jurisprudence and jurisdiction of the Court. In *Burke v. Barnes*, 479 U.S. at 365, for example, the Court granted a petition for writ of certiorari in order to vacate the decision of the court of appeals on mootness grounds and remanded with instructions to dismiss the complaint. Similar relief has been granted in other cases on a petition for writ of certiorari. *See, e.g., Duke Power Co. v. Greenwood County*, 299 U.S. at 267; *Allen v. Ellisor*, 454 U.S. 807 (1981); *Board of Governors of the Federal Reserve System v. Security Bancorp*, 454 U.S. 1118 (1981). If, as defendants contend, the Court "cannot" grant certiorari in cases such as this it would have been without power to take the action it took. Plainly, defendants' argument that the Court cannot grant certiorari in this case is without merit.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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